No. 92-1378

In The

Supreme Court of the United States

October Term, 1992

NATIONAL STATES INSURANCE COMPANY,

Petitioner,

vs.

IDA NASSEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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No. 92-1378

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NATIONAL STATES INSURANCE COMPANY,

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IDA NASSEN,

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On Petition for a Writ of Certiorari to the Supreme Court of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Ida Nassen, respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the Iowa Supreme Court's opinion rendered on December 23, 1992.

STATEMENT OF THE CASE

On July 21, 1989, Ida Nassen filed suit against National States Insurance Company ("National States") for breach of contract, bad faith and fraudulent misrepresentation in relation to the issuance of a nursing home insurance policy to her and the subsequent non-payment of those benefits. In April of 1988, Ida Nassen, then 85, purchased a nursing home policy from National

States (Pet. App. 2a). The policy was sold to her by an independent agent, Ken Phillips, who filled out the application form for her by asking Ida certain questions about her medical history. *Id.* Ida Nassen properly and truthfully answered all the health care questions. *Id.* The policy was subsequently issued on April 28, 1988. *Id.*

In June, 1988, Ida Nassen was placed in a nursing home because of uncontrolled diabetes, mild hypothyroidism and mild dementia. *Id.* Irene Crippen, Ida's good friend and attorney-in-fact, submitted a properly completed and signed claim form for nursing home benefits to National States on July 6, 1988. *Id.* Irene Crippen called National States a number of times in August and September, but National States failed to return the phone calls. *Id.* Three months after receiving the claim, National States sent a letter to Mrs. Crippen asking for another signed claim form, which the company received on October 10 (Pet. App. 2a-3a). On October 21, National States sent another letter asking for another signed claim form (Pet. App. 3a). By this time, Irene Crippen was liquidating Ida's assets to pay for her care at the nursing home. *Id.*

On November 5, Irene Crippen sent the third signed claim form requested by National States. *Id.* On November 8, the insurance company sent another letter to Irene Crippen requesting yet another signed claim form. *Id.* Mrs. Crippen responded advising the insurance company that she had already sent three completed and signed claim forms and asked if they were giving her the "runaround." *Id.*

In late January of 1989, five months after the initial claim for benefits was properly filed with National States, Mrs. Crippen again called the company to inquire about Ida's claim. The company returned the call a week later and told her that they were waiting for the doctor's report. *Id.* The report was sent to National States and received by it on February 7, 1989. *Id.* When an attorney

hired by Mrs. Crippen inquired about Ida's claim in March, the head of the nursing home division advised that the company was still waiting for the doctor's report which they had already received a month earlier. *Id.*

On April 4, 1989, after delaying action on the claim for nine months, the company rescinded the policy based on a claim that the application form was inaccurate and incomplete as to chronic confusion and hypothyroidism. *Id.* The law firm retained by Mrs. Crippen pointed out to the insurance company that Dr. Anderson, her treating physician, had sent a report to National States indicating that Ida did not have the chronic confusion and hypothyroidism before the date of her application. *Id.* Regardless, National States then returned Ida Nassen's premium and purported to rescind the policy retroactive to the date of issuance (Pet. App. 4a).

Dr. Marshall Reavis, a professor of insurance, who specializes in fraudulent practices of insurance companies, studied the company's premium structure, underwriting practices, and claim handling procedures as described by National States personnel (Pet. App. 4a-5a). Dr. Reavis concluded that the company's practices reflected a broad plan to run large amounts of cash through the company that could be invested and ultimately paid out to the company's principals prior to the collapse (Pet. App. 5a). The practice is called "cash flow underwriting." *Id.*

The premium charged by National States is less than a third of that charged by other companies. *Id.* Dr. Reavis testified that the premium had virtually no chance of being sufficient to pay the claims and administrative costs on the policies sold. *Id.* This factor, in conjunction with the company's deliberate delay in processing claims, led Dr. Reavis to conclude that the company was applying "post-claim underwriting." *Id.* He described "post-claim underwriting" as an attempt to rescind policies after claims had been made to the insurers. *Id.*

After the trial, the jury returned a verdict for the Respondent on the claim of breach of conduct, bad faith and fraudulent misrepresentation. The jury awarded $43,800.00 for breach of contract; $40,000.00 for bad faith and fraud;[1] and $500,000.00 in punitive damages. National States filed a motion for judgment notwithstanding the verdict and a motion for new trial (Res. App. 1a-5a). National States did not claim that the punitive damage award violated their due process rights under the Constitution of the United States. *Id.* The objections to the punitive damage award were that the jury instructions were incomplete, the evidence inadequate, and the verdict excessive as being a result of passion and prejudice (Pet. App. 18a-19a). The trial court Judge determined that none of the arguments of National States had any merit. *Id.*

National States then appealed to the Iowa Supreme Court on June 4, 1991. National States once again did not raise a constitutional claim in its brief that the punitive damages violated its due process rights (Res. App. 6a-10a). The only issues raised by National States about the punitive damage award were that the jury instructions should have included a definition of negligence for comparative purposes and that the verdict was excessive based on state law standards of review (Res. App. 6a-10a). The Iowa Supreme Court analyzed the reward under the same standard it had used for many years. National States argued those standards where applicable and should be applied to the verdict (Res. App. 9a-10a). The Iowa Supreme Court affirmed the trial court's verdict in its opinion of December 23, 1992.

---

1. The jury actually awarded Nassen $40,000.00 for bad faith and $40,000.00 for fraud, but the trial court found that the damages were duplicative and reduced the verdict by $40,000.00 (Pet. App. 21a). The Iowa Supreme Court approved this reduction treating the award as being fully supported by the bad faith claim (Pet. App. 10a). The Iowa Supreme Court, however, never ruled that the fraud claim was not supported by the evidence at trial. *Id.*

On January 4, 1992, National States filed a Petition for Rehearing in the Iowa Supreme Court. In the Petition for Rehearing, for the first time, National States argued that its due process rights had been violated by the punitive damages award. The Iowa Supreme Court denied the Petition for Rehearing en banc without opinion (Pet. App. 15a).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The writ should be denied. The Petitioner has failed to properly raise the due process issue before the Iowa Supreme Court that is now presented in its Petition for Writ of Certiorari. The decision below does not conflict with any decision of this Court and a decision in this case would provide no additional guidance as to the parameters of the due process clause of the Constitution beyond the decision recently issued by this Court. In addition, the issue is now moot since National States has paid the judgment to a party that will be unable to fully pay it back.

I.

THIS COURT HAS NO JURISDICTION BECAUSE THE PETITIONER FAILED TO TIMELY RAISE THE DUE PROCESS ARGUMENT IN ITS APPEAL BEFORE THE IOWA SUPREME COURT.

National States failed to raise its due process claim before the trial court or the Iowa Supreme Court (Res. App. 1a-10a). There was no mention of a constitutional issue in the trial court's decision on National State's motion for judgment notwithstanding the verdict and new trial. (Pet. App. 16a-21a). The Iowa Supreme Court also did not mention any constitutional issue in its decision (Pet App. 1a-14a). Failure to raise the constitutional argument in its

post-trial motions and in its Brief before the Iowa Supreme Court constituted a waiver of that issue in Iowa. *Osborn v. Iowa Natural Res. Council*, 336 N.W.2d 745, 747 (Iowa 1983); *McBroom v. State*, 226 N.W.2d 41, 47 (Iowa 1975).

The issue was first raised by National State in its Petition for Rehearing which was denied without decision (Pet App. 15a). Petitioner admits as much in its Brief in support of its petition. There was no decision by the Iowa Supreme Court on the issue raised by National States' Petition for Writ of Certiorari because National States failed to raise the issue in a timely manner.

28 U.S.C. § 1257(a) requires that Petitioners specifically claim in the lower appellate court the constitutional right it now seeks to have the Court enforce. It has long been the position of this Court that it will not, in reviewing a judgment of the state's highest Court, review a constitutional claim that was first raised in a motion for rehearing which the state court denied without opinion. *Webb v. Webb*, 451 U.S. 493, 496-497 (1981); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). When a state court has failed to pass on the federal question, it is assumed that the omission was due to the failure of the Petitioner to properly present the issue. *Webb v. Webb*, 451 U.S. 493, 495 (1981). In *Herndon*, the Court stated that:

> The long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the Court actually entertains the question and decides it.

Herndon v. Georgia, 295 U.S. 441, 443 (1935). There was no such decision in this case on the application for rehearing and there is no jurisdiction under 28 U.S.C. § 1257(a) for a writ of certiorari.

Petitioner appears to claim that it was surprised when the Iowa Supreme Court supposedly introduced the federal question in its decision by ignoring *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032 (1991) and by stating that there was no inflexible mathematical ratio between compensatory damages and punitive damages. In Petitioner's Brief before the Iowa Supreme Court, however, the Petitioner cited in support of its argument the very proposition it now disclaims (Res. App. 9a). Furthermore, the Petitioner failed to cite *Haslip* in its Brief before the Iowa Supreme Court or make a due process argument, even though *Haslip* was decided at least eight months before Petitioner's Brief was filed with the Iowa Supreme Court. In addition, the argument of surprise has no merit since the issue of a due process limitation on punitive damages is not a new one and has been the subject of constitutional litigation for several decades. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, ___, 111 S. Ct. 1032, 1038-1040 (1991). There is no excuse for Petitioner to have failed to properly raise the constitutional issue before the Iowa Supreme Court and the Petitioner's failure to raise that claim denies this Court jurisdiction.

II.

A DECISION IN THIS CASE BY THE COURT WILL PROVIDE NO FURTHER GUIDANCE ON THE ISSUE OF THE DUE PROCESS LIMITATION ON PUNITIVE DAMAGES.

Petitioner argues that this case affords the Court the opportunity to address in a meaningful way the due process parameters for punitive damages. A decision in this case will do no more to set out those parameters then the Court has already set out in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032 (1991). In *Haslip*, the Court affirmed a case that involved a 1:4 ratio as not "jarring one's sensibilities." *Pacific Mut. Life Ins. Co.*

v. Haslip, 499 U.S. ___, ___, 111 S. Ct. 1032, 1043 (1991). The actual damages awarded in this case and approved by the lower court was $88,000.00. The punitive damage award was $500,000.00. This is a little over a 1:5 ratio which is not significantly different than the one analyzed by the *Haslip* Court.

In addition, the facts of this case justify such a punitive damage award. The case involves the outrageous situation of a nursing home insurance company entering into a broad based scheme to defraud elderly people in this country by selling nursing home insurance and then rescinding the policies when a claim is made. The principals of the company had removed over $500,000.00 in cash in the last two years as part of this scheme. This case does not jar one's sensibilities, but rather gives one a sense of justice that an elderly individual could use the system to fight back.

This case is not the proper case for the Court to address the issue raised by the petition for Writ of Certiorari. The Court already has a case pending before it that will address the issue raised by the Petitioner. *TXO Production Corp. v. Alliance Resources Corp., et al.*, No. 92-179, October Term, 1992. That case involves a much greater discrepancy between actual and punitive damages. There is no need for this Court to also review this case.

III.

THE PAYMENT BY NATIONAL STATES OF THE JUDGMENT TO A PARTY THAT CANNOT REPAY IT HAS MADE THIS MATTER MOOT.

On March 3, 1993, National States chose to pay the judgment in full after being denied a stay by the Iowa Supreme Court. National States made no effort to obtain a stay from this Court. The payment to Ida Nassen has made this matter moot since she is

unable to repay the judgment and a substantial portion of the money will be spent prior to a decision by this Court.

Normally, payment of a money judgment does not moot an appeal since repayment can be enforced. *Marin v. England*, 385 U.S. 99, 100-101 (1966). In this case, however, payment has been made to a 90-year old woman who is in a nursing home previously being paid for by Title XIX. As result of the payment of the judgment, Ida Nassen no longer qualifies for Title XIX. Mrs. Nassen will be required to use the money paid to her by National States to pay for her nursing home care during the pendency of this matter. There is no way National States can recover the money spent in light of Ida Nassen's age and financial circumstances. Thus, this matter should be considered moot as a result of National State's payment of the judgment. *Heitmuller v. Stokes*, 256 U.S. 360, 361-62 (1920).

CONCLUSION

For the reasons set forth above, Respondent, Ida Nassen, respectfully requests this Court to deny National States' Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — RELEVANT PORTIONS OF PETITIONER'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL

IN THE IOWA DISTRICT COURT

IN AND FOR STORY COUNTY

CAUSE NO. 33838-0789

IDA NASSEN,

Plaintiff,

vs.

NATIONAL STATES INSURANCE COMPANY,

Defendant.

MOTION FOR JUDGMENT NOTWITHSTAND VERDICT AND MOTION FOR NEW TRIAL AND REQUEST FOR HEARING

COMES NOW, the above-named Defendant and states to the Court:

JUDGMENT NOTWITHSTANDING THE VERDICT

* * *

FRAUDULENT MISREPRESENTATION

1. At the close of Plaintiff's evidence and again at the close of all the evidence, Defendant moved for a directed verdict with

respect to Plaintiff's claim of fraudulent misrepresentation and the claim of punitive damages thereunder.

2. That upon the trial the jury returned a verdict in favor of the Plaintiff in the amount of $40,000.00, plus a punitive damage award of $500,000.00.

3. That the Court should have sustained Defendant's Motion for Directed Verdict.

4. That the Court should now direct a judgment notwithstanding the verdict in favor of the Defendant with respect to Plaintiff's count of misrepresentation, including punitive damages for the following reasons:

a. There is no clear, convincing and satisfactory evidence that the Defendant or any of its representatives made any representations to the Plaintiff that at the time said representations were made were false, nor that the Defendant knew they were false, nor that any representations were made in reckless disregard of the truth.

b. All that the evidence does show is that Plaintiff made application for a nursing home policy, that her application was approved, and that the policy was duly issued. The evidence further shows that a subsequent claim was made on the policy, and that the company denied the claim and rescinded the policy.

c. That the representations made in the policy (Exhibit #9) and in the sales brochure (Exhibit #11) were true and correct and not false, and no showing has been made by the requisite proof that these representations were false in any way.

Appendix A

d. There is no showing by the requisite proof in this record that the Plaintiff acted in reliance on the truth of any representations made.

e. That plaintiff wholly failed to produce any proof showing any monetary or actual damage to herself growing from any alleged misrepresentation, other than the benefits of the insurance policy itself.

f. That Plaintiff fully failed to show by the requisite burden of proof that any fraud was perpetrated upon the Plaintiff, or that Plaintiff was entitled to have the issue of punitive damages submitted to the jury as part of her fraudulent misrepresentation count.

g. That the evidence produced over objection relative to Defendant's underwriting policies, claims handling policies, and financial structure was never connected up to show any fraud on the part of the Defendant towards the Plaintiff, especially as it relates to any representations made. That such evidence went to general practices of the Defendant and was not in any way directed toward the Plaintiff, and there was not adequate showing to make a connection between said practices and the allegation of fraud.

* * *

BAD FAITH

* * *

5. That with respect to the award to punitive damages, there is not an adequate showing of actual or legal malice on the part of the Defendant, but the evidence rises only to the level of negligence as

it relates to Defendant's delay in making a decision on Plaintiff's claim. That any other conduct of Defendant was not directed specifically at the Plaintiff as is indicated in Special Verdict No. 9.

7. That the Court erred in allowing the testimony of the expert insurance witness, Marshall Reavis, in that said testimony was not directed toward Plaintiff or connected with Plaintiff, except in a very general way in that she was a policyholder. That said testimony and the foundational testimony relative to Defendant's underwriting practices, claim handling practices and financial structure is irrelevant to the claim and decision with respect to the Plaintiff, and is unduly prejudicial to the Defendant and does not allow the Defendant to receive a fair trial.

8. That the gross excessiveness of the punitive damage award appears to have been influenced by the passion or prejudice of the jury. That the punitive damages verdict is not sustained by sufficient evidence and is contrary to law.

9. That the evidence goes at best to alleged unfair practices on behalf of the Defendant as those are outlined under Chapter 507B.4(9) of *The Iowa Code*, and do not give rise to private claims by individual policyholders.

10. That the Court in failing to define legal malice, actual malice and negligence as requested by Defendant in Defendant's Requested Jury Instruction No. 9, commited error and did not adequately apprise the jury of the law as it relates to the awarding of punitive damages. That the Instruction as given was inadequate and allowed the jury to in effect use a lesser standard for the awarding of punitive damages.

* * *

Appendix A

FRAUDULENT REPRESENTATION

* * *

5. The punitive damage award is excessive, contrary to law and the result of passion and prejudice on the part of the jury.

6. For the reasons set forth in Defendant's Motion for Judgment Notwithstanding the Verdict on the issue of fraudulent misrepresentations, and for those reasons set forth in paragraphs 7, 8, 9, and 10 of Defendant's Motion for New Trial in relation to bad faith which are incorporated here and made a part hereof, an award of punitive damages under Plaintiff's count dealing with fraudulent misrepresentation is not supported by sufficient evidence and is contrary to law.

* * *

APPENDIX B — RELEVANT PORTIONS OF PETITIONER'S IOWA SUPREME COURT BRIEF IN WHICH PUNITIVE DAMAGES ARE DISCUSSED

91-880

IDA NASSEN,

Plaintiff-Appellee,

vs.

NATIONAL STATES INSURANCE COMPANY,

Defendant-Appellant.

APPELLANT'S BRIEF
AND
REQUEST FOR ORAL ARGUMENT

III

THE JURY INSTRUCTION NUMBER 27 WITH REFERENCE TO PUNITIVE DAMAGES WAS INCOMPLETE

In regard to objection to jury instructions, the Court reviews for errors at law. Rule 4, I.R.A.P.; *Meck v. Iowa Power and Light,* 469 N.W. 2d 274 (Iowa App. 1991).

Defendant submitted a proposed jury instruction (A. 473-474) which modified the uniform jury instruction regarding punitive damages. The Trial Court submitted the uniform instruction and defendant's counsel objected (A. 467-468). The proposed instruction read as follows:

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DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 9

The Plaintiff also claims that punitive damages should be awarded on her claims of bad faith and fraudulent misrepresentation. Before punitive damages may be awarded, the Plaintiff must prove by a preponderance of clear, convincing and satisfactory evidence that the Defendant acted with actual or legal malice, *rather than mere negligence,* toward Plaintiff. Legal malice is established by acts committed by and continued with a willful or reckless disregard for the rights of another. In addition, the Defendant's conduct must cause actual damage to Plaintiff.

The term, "negligence", means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

Punitive damages are not intended to compensate for injury, but are allowed to punish and discourage a defendant and others from like conduct in the future.

There is no exact rule to determine the amount of punitive damages, you may consider all of the evidence, including:

1. The nature of Defendant's conduct;

Appendix B

> 2. The amount of punitive damages which will punish and discourage like conduct by the Defendant in view of its financial condition;
>
> 3. Plaintiff's actual damages. (emphasis added)

The Court in instructing the jury relative to punitive damage failed to make clear the distinction between malice and negligence. Instruction No. 27, as given, uses the language of the definition of malice, but does not contrast that type of conduct with that of negligence nor define negligence. The Iowa Supreme Court has made the following statement regarding the malice requirement for punitive damages:

> "Actual malice is shown by such things as personal spite, hatred or ill-will. Legal malice is established by showing wrongful conduct committed with a willful or reckless disregard for the rights of another. *More than mere negligence must be shown.* (Emphasis added).

Mills v. Guthrie Rural Electric, 454 N.W. 2d 846 (Iowa 1990). Citing *Barnhouse v. Hawkeye State Bank,* 406 N.W. 2d 181 (Iowa 1987).

The negligence reference and definition was critical to a proper determination of damages in this case. The Plaintiff made much about the delay in the processing of Plaintiff's claim. Anyone hearing that evidence would find the situation frustrating and irritating. However, the jury needed a guidepost from the Court to distinguish between negligent conduct and that conduct which is the product of malice and subject to punitive damages. Without the instruction, the jury would be unable to make the distinction.

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Assuming that the statement "more than mere negligence must be shown" should have been included within the punitive damage instruction, the term "negligence" should have been defined. A term which has a definite legal meaning must be properly defined in the jury instructions. *Kirk v. Marshall,* 247 S.W.2d 454, 455-456 (Texas 1952); *St. Louis Southwestern Railway Co. of Texas v. Jones,* 138 S.W.2d 577, 578 (Texas 1940). The term negligence is such a term which requires a proper definition. *Reilly v. Buster,* 82 S.W.2d 931, 932 (Texas 1935); *St. Louis Southwestern Railway Co. of Texas v. Jones, Id.* at 578.

For the above described reasons, Defendant submits that its instruction regarding punitive damage should have been inserted instead of the one submitted by the Trial Court.

C. THE AWARD OF PUNITIVE DAMAGES WAS EXCESSIVE

In addition to the discussion above, this Court has stated that the amount of exemplary damages is peculiarly within the discretion of the trier of fact. *Grefe v. Ross,* 231 N.W.2d 863 (Iowa 1975). However, exemplary damages must generally be proportionate to the actual damages shown. *Pringle Tax Service, Inc. v. Knoblauch,* 282 N.W.2d 151 (Iowa 1979). However, there is no set mathematical ratio between actual damages and exemplary damages, *Northrup v. Miles Homes, Inc. of Iowa,* supra, 204 N.W.2d 850 (Iowa 1973).

In one of the well known bad faith cases, the California Supreme Court, en banc, held that an award of punitive damages of $5,000,000 was excessive. *Egan v. Mutual of Omaha Ins. Co.,* 620 P.2d 141 (Cal. 1979). They reasoned that the award amounted to two and one-half months (20%) of Mutual's entire net income in 1973 and more than seven months (60%) of such income in 1975. *Id.* at 149.

Appendix B

In this case the contractual damages were $43,800. The punitive damages were eleven times that amount and five times the total actual damages. More importantly, the award was 45% of the company's net income in 1989 (A. 346) and 60% of the company's net income in 1990. (A. 546-549). Given the theory of the plaintiff and her expert that the company would be bankrupt within two years (A. 360), this award will only hasten the company's demise. For these reasons, the punitive damage award was clearly excessive.

* * *